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In the Supreme Court United States

OCTOBER TERM, 1933

No. 308

MAXINE MURRAY, on her own behalf, and as Guardian Ad Litem of MAXINE LOIS MURRAY, a minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN,

Respondents.

PETITIONERS' BRIEF ON RESPONDENTS' MOTION TO DISMISS

The authorities cited by the respondents in their motion have no application to the judgment or facts in this case. They all relate to judgments entered in the lower courts for the amount in controversy and, of course, all must join on an appeal or petition for writ of certiorari, or an order of summons and severance taken. That is well settled. They have no ap-

plication to a judgment against one of the parties merely for costs.

The judgment in this case against the Fidelity & Deposit Company of Maryland, as surety, was one for costs only. (The bond for costs on which the judgment was entered in this case appears in the original transcript at p. 28 (omitted in printing). The judgment appears in the original transcript at p. 47, and in the printed record at p. 30.) The condition of the cost bond on which the judgment for costs was entered against the Fidelity & Deposit Company of Maryland read as follows:

> "NOW, THEREFORE, if the said Principal, MAXINE MURRAY, on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, shall pay to JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R.W. KALTENBACH CORPORATION, F.W. CORNING, IRVING GOTTHEIM, and MAX BLOOMENSTEIN, the defendants above named, all costs and damages that may be awarded against her on the appeal, or on the dismissal thereof, not exceeding the sum of TWO HUNDRED DOLLARS ($200.00), then this obligation to be void; otherwise to remain in full force and effect."

The Fidelity & Deposit Company of Maryland, as surety, only became liable thereon in case the principal, Maxine Murray, the petitioner, failed to pay the costs so awarded. The surety company never was

made a party to this action and was not "connected with the case or interested in the controversy" between the petitioners and respondents in any way. No supersedeas bond was ever given, nor a stay of proceedings ever asked or had in this case. The respondents were at liberty at all times to proceed to recover their costs in the lower courts if they chose to do so.

IT IS WELL SETTLED THAT THIS COURT WILL NOT REVIEW AN APPEAL OR GRANT CERTIORARI TO REVIEW A JUDGMENT SIMPLY FOR COSTS.

Circuit Judge Seaman, in the case of *Harding v. Corn Products Mfg. Co.*, 198 Fed. 628, states the rule as follows:

> "The Supreme Court, commencing with *Canter v. American Insurance Co.*, 3 Pet. 307, 316 (7 L. Ed. 688), has invariably pronounced the rule to be that 'no appeal lies from a mere decree respecting costs' against a party in suit, in equity or admiralty. See 3 Notes U. S. Rep. 70; *Gunckel on Costs in Federal Courts*, c. 35, Sec. 80. In *City Bank of Ft. Worth v. Hunter*, 152 U. S. 512, 516, 14 Sup. Ct. 675, 676 (38 L. Ed. 534)."

In the case of *Wright v. Gorman-Wright Co.*, 152 Fed. 408, at 410, in the Fourth Circuit (certiorari denied 207 U. S. 587, 53 L. Ed. 353), the court says:

> "There is another reason why appellant is not entitled to invoke the jurisdiction of this court.

It is well settled that in cases like the one under consideration an appeal will not lie from a decree for costs. In the case of *Elastic Fabrics Co. v. Smith,* 100 U. S. 110, 25 L. Ed. 547, Mr. Chief Justice Waite, in delivering the opinion of the court, said:

> 'No appeal lies from a mere decree respecting costs and expenses.'

Also, in the case of *Dubois v. Kirk,* 158 U. S. 58-67, 15 Sup. Ct. 729, 39 L. Ed. 895, Mr. Justice Brown, in delivering the opinion of the court, said:

> 'This court held in several cases that an appeal does not lie from a decree for costs.'

Justice Story, in delivering the opinion of the court in the case of *Canter v. Insurance Co.,* 3 Pet. 318, 7 L. Ed. 688, said:

> 'No appeal lies from a decree respecting costs and expenses.'
>
> Also the following cases sustain this view: *Paper Bag Machine Co. Cases,* 105 U. S. 766, 26 L. Ed. 959; *Wood v. Weimar,* 104 U. S. 786, 26 L. Ed. 779; *Russell v. Farley,* 105 U. S. 433, 26 L. Ed. 1060."

A judgment against a party for costs does not give him an appealable interest in the judgment upon the merits.

Smith v. Indiana, 191 U. S. 138, 48 L. Ed. 125. It must be such personal interest in the litigation as he has suffered or may suffer by the decision. One

who has not the requisite interest as thus intended cannot appeal nor can one who is not aggrieved by the judgment from which the appeal is sought.

Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252.

The Fidelity & Deposit Company of Maryland was therefore not a proper party to be joined with the petitioner, Maxine Murray, on her petition for certiorari or against whom she should have had summons and severance issued.

It is therefore definitely settled that the Fidelity & Deposit Company of Maryland in this case could not have appealed from the judgment for costs against it or prosecuted a petition for a writ of certiorari to review the same. Nor were the respondents prevented in any way from proceeding to collect their costs at any time by reason of the petitioners' having applied to this court for a writ of certiorari without having summons and severance issued against the Fidelity & Deposit Company of Maryland. These are the two reasons given by this Court requiring the service of summons and severance against a party to an action on appeal or writ of certiorari to this Court.

REASONS FOR REQUIRING ISSUANCE OF SUMMONS AND SEVERANCE AGAINST PARTY NOT JOINING IN APPEAL OR PETITION FOR CERTIORARI.

This Court, in the case of *Hartford Accident & Indemnity Co. v. Bunn,* 285 U. S. 169, at 180, 79 L. Ed. 685, at 689, announces the rule and reasons for it as follows:

> "There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. . . . One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature."

None of these reasons given, requiring the issuance of a summons and severance, exist in this case. The rule, therefore, requiring the issuance of summons and severance, likewise ceases.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND WAS FULLY NOTIFIED IN WRITING BY THE PETITIONER OF HER APPLICATION FOR WRIT OF CERTIORARI IN THIS CASE.

The Fidelity & Deposit Company of Maryland was also not only notified of the application of the

petitioners in this case to the Supreme Court of the United States for a writ of certiorari, but also refused to join or take any steps in the matter for the reason that it was not interested in the case. A written copy of the petition of the petitioners for a writ of certiorari, together with a copy of the record, was served upon the Fidelity & Deposit Company of Maryland and acknowledgment of receipt of service thereof accepted and forwarded to the Clerk of this Court for filing.

The Fidelity & Deposit Company of Maryland has also entered its appearance in this action, Appendix Exhibit "B," through William Martin, Esq., its attorney, and submits to the jurisdiction of this Court as fully as though it had joined with the petitioners in their petition for a writ of certiorari, and has waived the time for filing briefs and all other proceedings had herein, to the end that the petitioners may be heard as fully and to all intents and purposes upon their petition as though it had originally joined therein and had not heretofore, on notice, refused so to do. Under the following authorities, that constitutes sufficient compliance with the rule and, as said by Circuit Judge Gilbert in *Richards v. American Bank*, 234 Fed., 300, it "thereby became a party to all intents and purposes as though originally joined." And, as

said by Circuit Judge Warrington in the case of *Hill v. Western Electric Co.*, 214 Fed. at 245,

> "In these circumstances we are disposed to treat the record as including the bankrupt at least as a party appellee. *Richardson v. Green,* 130 U. S. 104, 114, 115, 9 Sup. Ct. 443, 32 L. Ed. 872; *Dayton v. Lash,* 94 U. S. 112, 24 L. Ed. 33. He has been given ample opportunity to be heard on the appeal, and so the rule and the reason for requiring his presence (that is, that the successful party shall be at liberty to enforce the decree against parties who do not desire to have it reviewed, and the appellate tribunal shall not be required to decide the same question on the same record more than once) are practically satisfied (*Masterson v. Herndon,* 77 U. S. (10 Wall.) 416, 417, 19 L. Ed. 953; *Davis v. Mercantile Trust Co.,* 152 U. S. 590, 593, 14 Sup. Ct. 693, 38 L. Ed. 563; *In re Dandridge & Pugh,* 209 Fed. 838, 126 C. C. A. 562 (C. C. A. 7th Cir.), *although the time within which Rankin might have appealed has long since expired.* Questions like this are regulated by the rule governing appeals in equity in the courts of the United States. *General Order in Bankruptcy,* No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi). The rule in equity, as well as the federal statutory policy, is liberal in allowing amendments respecting any defect in process or pleading. 1 *Foster,* Fed. Prac. (3rd Ed.) Sections 160, 161, et seq.; *Browning v. Boswell,* 209 Fed. 788, 791, 126 C. C. A. 512, (C. C. A. 4th Cir.). It is not suggested that the practice in this respect in equity or bankruptcy is less liberal than it is at law (*Carey v. Donohue,* 209 Fed. 328, 330, 126 C. C. A. 254 (C. C. A. 6th Cir.)); and the course we are now pursuing is well within the reason of the kindred rule recognized in appellate courts in cases at law (*Teel v.*

Chesapeake & O. Ry. Co. of Virginia, 204 Fed. 914, 917, 123 C. C. A. 210 (C. C. A. 6th Cir.), and citations). The motion to dismiss must therefore be overruled."

ALL COSTS, WITH INTEREST, AWARDED ON COST BOND IN THIS CASE WERE PAID INTO COURT BY PETITIONER.

The judgment for costs against the Fidelity & Deposit Company of Maryland (R. 30) on remand was filed with the Clerk of the Superior Court of the State of Washington for Kitsap County on May 16, 1933, and the amounts awarded as costs, with all interest thereon, have been paid into the Clerk's office of the Superior Court of the State of Washington for Kitsap County in this case by the petitioner, Maxine Murray, for the respondents, in compliance with the petitioner's obligation under her said cost bond so to do. (Certified copy of judgment and certificate of Clerk of the Superior Court of the State of Washington for Kitsap County, with seal of court, filed with the Clerk of this Court, a copy of which is marked Exhibit "A" in appendix).

At the time at which the Fidelity & Deposit Company of Maryland signed the cost bond as surety for Maxine Murray, the company took indemnity from the petitioners fully indemnifying it against all lia-

bility under the bond or for the payment of any costs which it might be required to make. The surety company did not in anywise stand in the light of a party to this action but only in lieu of a deposit for costs in the sum of $200 which the petitioner, Maxine Murray, could as well have deposited with the Clerk of the Superior Court of the State of Washington for Kitsap County in place of giving any cost bond on appeal. Had this course been pursued by the petitioner, would respondents still contend that petitioner would be required to have summons and severance issued against the deposit for costs which stood in lieu of the cost bond?

RESPONDENTS WAIVED THE OBJECTION NOW URGED IN THEIR MOTION TO DISMISS BY NOT MAKING THE MOTION WITHIN THE TIME REQUIRED FOR HEARING PETITIONERS' PETITION FOR WRIT OF CERTIORARI, AND BY WAITING UNTIL THIS COURT GRANTED CERTIORARI.

The petition for certiorari was filed August 3, 1933, and certiorari granted October 9, 1933.

It is respectfully submitted that respondents' motion to dismiss should be denied.

WM. MARTIN,

Attorney for Petitioners.

APPENDIX

"Exhibit A"

10433

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAY SESSION A. D. 1933

BE IT REMEMBERED, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of May, A. D. 1933, it being the Eighth day of said month, among other, the following was had and done, to-wit:

Friday, May 12th, 1933.

MAXINE MURRAY on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor, *Appellant,* vs. JOE GERRICK & CO., INDUSTRIAL BROWN HOIST CORPORATION, et al, *Respondents.*	No. 24301 JUDGMENT

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Kitsap County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 12th day of May, A. D. 1933, on motion of J. Speed Smith, Henry Elliott, Jr., Stephen V. Carey, of counsel for respondents, considered, ad-

judged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Respondents have and recover of and from the said Maxine Murray and from Fidelity & Deposit Co. of Maryland, surety, their costs as follows: Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein, $68.30; Joe Gerrick & Co., the costs of this action taxed and allowed at Thirty and 50/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

I, C. S. REINHART, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 12th day of May, A. D. 1933.

(Supreme Court Seal). C. S. REINHART,

Clerk of the Supreme Court,
State of Washington.

Filed May 16, 1933.
Reina M. Osburn, Clerk,
By Arthur Lund, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

MAXINE MURRAY on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor,

Appellant,

vs.

JOE GERRICK & CO., INDUSTRIAL BROWN HOIST CORPORATION, et al,

Respondents.

No. 10433
CERTIFICATE

I, REINA M. OSBURN, County Clerk, and by virtue of the laws of the State of Washington, ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the Judgment of the Supreme Court in the above entitled action, as the same now appears on file and of record in my office.

I hereby further certify that the amounts stated in said Judgment to-wit: Sixty-eight and 30/100 ($68.30), and Thirty and 50/100 ($30.50), with interest at 6 per cent per annum from the 12th day of May, A. D. 1933, have been paid in full into this office by Maxine Murray the plaintiff in this court and the appellant in the Supreme Court of the State of Washington, for respondents.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 16th day of November, 1933.

REINA M. OSBURN, *Clerk.*
By ARTHUR LUND, *Deputy.*

(Superior Court Seal)

"Exhibit B"

SUPREME COURT OF THE UNITED STATES

October Term, 1933

No. 308

MAXINE MURRAY, on her own behalf, and as Guardian ad litem of MAXINE LOIS MURRAY, a minor,

Petitioners,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, F. W. CORNING, IRVING GOTTHEIM and MAX BLOOMENSTEIN,

Respondents.

APPEARANCE

Comes now the Fidelity & Deposit Company of Maryland, the party named as surety with the petitioner, Maxine Murray, as principal, in the judgment appearing at page 30 of the Printed Record in the above proceedings, by and through William Martin, Esq., its attorney, and enters its appearance and submits to the jurisdiction of this Court in this action as fully as though it had joined with the petitioner in her petition for a writ of certiorari; and does hereby waive the time for filing briefs and all other proceedings had herein, to the end that the petitioners may be heard as fully and to all intents and purposes

upon their petition as though it had originally joined therein and had not heretofore, on notice, refused so to do.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By J. A. CATHCART, *Its Agent.*

WM. MARTIN,
Attorney for Fidelity & Deposit Company of Maryland.

Address: 611 Lowman Building, Seattle, Washington.